A **PAN MALAYSIA EQUITIES SDN BHD**

v.

ANGELINE TAN EEI WE

B HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D7-22-1667-2000]
29 OCTOBER 2010

C ***SECURITIES:*** *Share trading accounts - Contra losses - Claim by plaintiff stockbroking company for outstanding sum due in defendant's trading account - Undue influence - Procedure - Breach of T+5 rules and regulations of Kuala Lumpur Stock Exchange - Contracts Act 1950, ss. 16, 20*

D ***CONTRACT:*** *Shares, sale of - Contra losses - Claim by plaintiff stockbroking company for outstanding sum due in defendant's trading account - Undue influence - Procedure - Breach of T+5 rules and regulations of Kuala Lumpur Stock Exchange - Contracts Act 1950, ss. 16, 20*

E ***CONTRACT:*** *Undue influence - Setting aside due to - Procedure - Undue influence raised as a defence only - There must necessarily be an action by the oppressed in line with Specific Relief Act 1950 for court to exercise its power - Contracts Act 1950, ss. 16, 20*

F This was a claim by the plaintiff stockbroking company for the outstanding sum in the defendant's trading account which had become due as a consequence of contra losses from various transactions and for administration fees, interests and costs. The G defendant's defence, in essence, was premised on the jurisprudence relating to undue influence and the fact that the plaintiff had breached the T+5 rules and regulations of the Kuala Lumpur Stock Exchange.

H **Held (allowing the plaintiff's claim with costs):**

(1) The jurisprudence relating to undue influence is set out in s. 16 Contracts Act 1950 ('CA'), and has to be read with s. 20 CA which gives power to the court to set aside a contract induced by undue influence. For the court to exercise its power I there must necessarily be an action by the oppressed in line with the Specific Relief Act 1950. In the instant case, the defendant had raised undue influence as a defence only and had

not sought relief by an action or counterclaim to set aside the transaction. Procedurally, the court could not set aside the transaction. *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors and Other Appeals* (refd). (para 11)

(2) This was not a case, on the facts, in which there was an unconscionable bargain. At the time of opening the account and the transactions, like any other share trading account, the defendant stood to benefit from the account and was in a position to profit from the share transactions. All the shares bought were in the defendant's name. Applying the tests propounded in the established case authorities, the opening of the account and the transactions therein: (i) could not be said to be unreasonable; and (ii) could not be regarded as "no sane man, not under a delusion, would make and no honest man would take advantage of" or "no right-minded person would have executed a document of that type", as had been advocated by case law. There was also no merit in respect of the breach of the T+5 KLSE rules as the contract between the plaintiff and defendant did not permit the defendant to question the delay. *Teresa Chong v. Kim Khoon & Co* (foll); *Khairudin Abd Rahman v. Capital Corp Securities Sdn Bhd* (refd). (paras 13-14)

Case(s) referred to:

Barclays Bank Plc v. O'Brien [1994] 1 AC 180 ***(refd)***

Khairuddin Abd Rahman v. Capital Corp Securities Sdn Bhd [2001] 1 LNS 148 HC ***(refd)***

Polygram Records v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor [1994] 3 CLJ 806 ***(refd)***

Poosathurai v. Kannapa Chettiar [1919] LR 47 Ind Appl ***(refd)***

Public Finance Berhad v. Lee Bee Rubber Factory Sdn Bhd & Ors [1994] 2 CLJ 646 HC ***(refd)***

Saw Gaik Beow v. Cheong Yew Weng & Ors [1989] 1 LNS 75 HC ***(refd)***

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals [1997] 2 CLJ 607 CA ***(refd)***

Theresa Chong v. Kin Khoon & Co [1976] 1 LNS 165 FC ***(foll)***

Legislation referred to:

Contracts Act 1950, ss. 16(2), 20

Contract Act 1872 [Ind], s. 16

A *For the plaintiff - Arham Rahimy Hariri; M/s Azim, Tunku Farik & Wong*
For the defendant - SM Chan (HL Khor with him); M/s Tan Chuan Yong & SM Chan

Reported by Suresh Nathan

B

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the plaintiff's claim for the outstanding sum in the defendant's trading account. The defendant on the date of trial had informed that they are not proceeding with the counterclaim.

C

Brief Facts

D **[2]** The plaintiff is a stock broking company and is claiming for the outstanding sum in the defendant's trading account which has become due in consequence of contra losses from various transactions and for administration fees, interests and costs.

E **[3]** The defendant's defence in essence is premised on the jurisprudence relating to undue influence and the fact that the plaintiff had breached the T + 5 rules and regulations of the Kuala Lumpur Stock Exchange.

F In respect of the issue relating to undue influence the learned counsel for the defendant's summarises the case as follows: (i) the defendant was only 19 years old and a student when the trading account was opened under her name; (ii) the true account holder was her father who had, at the suggestion of the plaintiff, obtained her signature on a blank trading account application form in order
G that he may have a higher trading limit; (iii) the defendant signed the application form under influence of her father; (iv) the plaintiff had notice, actual or constructive, of the undue influence; (v) the father was the agent of the plaintiff in obtaining the defendant's signature on the blank application form; (vi) the contract is not
H enforceable (vii) further and/or in the alternative, the plaintiff had breached the T + 5 Rules and Regulations of the Kuala Lumpur Stock Exchange.

Preliminaries

I **[4]** One witness gave evidence for the plaintiff and the defendant and her father gave evidence. The defendant does not dispute the opening of the account but places the blame on the father and the father's evidence was meant to support the defendant's case.

[5] It must be noted that the defendant at the time of giving evidence was aged 32 and a software developer. She had never raised any objection with the plaintiff at any time or at all and never applied to the court to set aside and/or rescind the contract according to law and as provided under the Specific Relief Act 1950. There was also no report by the defendant against any impropriety on the part of the plaintiff with any relevant authorities.

[6] The plaintiff's evidence was consistent with the contractual terms and has been regularly sending communication to the defendant as per the contractual address which is also reflected in the defendant's statement of defence.

[7] It must also be noted that the plaintiff's contract with the defendant is a trading contract which is an approved form of trading by the regulators and is not a contract of indemnity or guarantee which often creates liability and gives no benefit to the sureties. And, the cases relied by the plaintiff does not relate to such contracts on the issue of undue influence.

Defendant's Argument

[8] Learned counsel for the defendant relied heavily on the House of Lords case of *Barclays Bank Plc v. O'Brien* [1994] 1 AC 180 to assert presumption undue influence and that part of the decision reads as follows:

> **Undue influence**
>
> A person who has been induced to enter into a transaction by the undue influence of another (the wrongdoer) is entitled to set that transaction aside as against the wrongdoer. Such undue influence is either actual or presumed. In *Bank of Credit and Commerce International SA v. Aboody* [1988] [1992] 4 All ER 955 at 964, [1990] 1 QB 923 at 953 the Court of Appeal helpfully adopted the following classification.
>
> Class 1: actual undue influence. In these cases it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.
>
> Class 2: presumed undue influence. In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In class 2 cases therefore there is no need

A to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, *viz*:

B

Class 2A. Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.

C

Class 2B. Even if there is no relationship falling within class 2A, if the complainant proves the *de facto* existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a class 2B case therefore, in the absence of

D evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned.

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In reliance of the above, the counsel submit as follows:

Thus, in the present case the relationship between the defendant and DW2 being that of parent and child clearly falls within Class

F 2(A) where proof of the relationship without more is sufficient to raise the presumption of undue influence. Therefore there is no need for the defendant to produce evidence that actual undue influence was exerted by her father in relation to the account and the transactions therein: once the relationship has been proved, the burden shifts to the plaintiff to prove that the defendant entered into

G the impugned contract freely.

[9] It must be noted here that the learned counsel conveniently uses the word "child" in reference to a person of 19 years old, literate who is an adult in law, to support the defence of undue

H influence which may be quiet difficult to comprehend at this time and era. In addition the transaction complained of relates to third party ie, the plaintiff and to succeed there must be a nexus and the defendant's attempts to suggest that the father was an agent of the plaintiff to bring the case within the *dicta* of *O'Brien* where the

I Lord Browne-Wilkinson had this to say:

> Up to this point I have been considering the right of a claimant wife to set aside a transaction as against the wrongdoing husband when the transaction has been procured by his undue influence. But in surety cases the decisive question is whether the claimant wife can set aside the transaction, not against the wrongdoing husband, but against the creditor bank. Of course, if the wrongdoing husband is acting as agent for the creditor bank in obtaining the surety from the wife, the creditor will be fixed with the wrongdoing of its own agent and the surety contract can be set aside as against the creditor. Apart from this, if the creditor bank has notice, actual or constructive, of the undue influence exercised by the husband (and consequentially of the wife's equity to set aside the transaction) the creditor will take subject to that equity and the wife can set aside the transaction against the creditor (*albeit* a purchaser for value) as well as against the husband: see *Bainbrigge v. Browne* [1881] 18 Ch D 188 and *BCCI v. Aboody* [1992] 4 All ER 955 at 980, [1990] 1 QB 923 at 973.

[10] In addition the learned counsel says that it is not necessary for the defendant to establish an agency between the plaintiff and the father for the defendant to succeed and asserts that it has been pointed out in *O'Brien*'s case that "even in the absence of agency, if the debtor has been guilty of undue influence or misrepresentation the creditor may not be able to enforce the surety contract if the creditor had notice, actual or constructive, of the debtor's conduct." And, relies heavily on the observation of Lord Browne-Wilkinson who had this to say:

> A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction. Under the ordinary principles of equity, her right to set aside that transaction will be enforceable against third parties (eg, against a creditor) if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts giving rise to her equity. Although there may be cases where, without artificiality, it can properly be held that the husband was acting as the agent of the creditor in procuring the wife to stand as surety, such cases will be of very rare occurrence. The key to the problem is to identify the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction.
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> The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party

A asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it. Therefore where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation, the creditor will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the creditor on inquiry as to the circumstances in which she agreed to stand surety.

C It must be noted here again that *O'Brien*'s case is quoted out of context as the House of Lords were referring to the debtor being guilty of undue influence. And I must say here again that many of the cases cited by the learned counsel for the defendant were cited D out of context and will not apply to the facts of this case.

[11] I have heard the evidence, read the documents and submission of the parties in detail. I take the view that the plaintiff's claim must be allowed. My reasons *inter alia* are as follows:

E (a) The jurisprudence relating to undue influence is set out in s. 16 of the Contract Act 1950 which reads as follows:

16. Undue influence

F (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

G (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the H other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental; or bodily distress.

I (3) (a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving

that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

(b) Nothing in this subsection shall affect section 111 of the Evidence Act 1950 [Act 56].

This section is *pari materia* to s. 16 of the Indian Contract Act 1872. The Privy Council in the case of *Poosathurai v. Kannapa Chettiar* [1919] LR 47 Ind. Appl has observed that there was no difference on the subject of undue influence between the Indian Contract Act 1872 and English laws. (see *Polygram Records v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor* [1994] 3 CLJ 806). The development of case laws in Malaysia has placed caveats as well as wide opening in contrast to English cases but the reason are based on equity and good conscience and justice of the case to case basis. For example, s. 16(2) refers to circumstances where undue influence is "presumed". To establish "undue influence" it is essential to prove "unfair advantage over the other." This may not be so at common law (see *Saw Gaik Beow v. Cheong Yew Weng & Ors* [1989] 1 LNS 75, HC). The distinction and development of jurisprudence is well captured by the learned author Dato' Seri Visu Sinnadurai in his book *"Law of Contract"* 3rd edn; Malaysia: Lexis Nexis.

(b) In addition s. 16 must not be read in isolation. It has to be read with s. 20 of CA 1950 which gives power to court to set aside contract induced by undue influence. For the court to exercise its power there must necessarily be an action by the oppressed in line with Specific Relief Act 1950. In the instant case the defendant has raised undue influence as a defence only and has not sought relief by an action or counterclaim to set aside the transaction. Procedurally in my view the court cannot in the instant case set aside the transaction. (see *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607).

(c) In the Malaysian context it is well settled that even if parties are husband and wife and if the wife has executed a guarantee in favour of the husband that *per se* will not invoke the doctrine of undue influence. (see *Public Finance Berhad v. Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 2 CLJ 646). In essence, courts do not readily invoke the doctrine of presumption on mere allegation of undue influence.

(d) I am mindful of the extremely liberal proposition advocated by Gopal Sri Ram JCA sitting in the Federal Court in the case of *Tengku Abdullah Ibni Sultan Abu Bakar* where it was stated:

> Undue influence, like all other equitable doctrines, is an extremely flexible concept. Subject to policy considerations, the categories in which it may operate are therefore not closed. It is important to apply the doctrine, as housed in s. 16 of the Contracts Act 1950, to varying fact patterns in a flexible manner. In the absence of any intention on the part of Parliament to alter the doctrine, s. 16, being a remedial provision, should be interpreted in a broad and liberal fashion. Even in cases which are not stricto sensu contractual in nature, the section may be resorted to by analogy.
>
> The proof of dominance of the will of a party to a transaction by the other party to the transaction is not a *sine qua non* of the doctrine of undue influence. The doctrine applies with equal force where, from the proved or admitted facts, there is shown a relationship of confidence and an abuse of that confidence by the person in whom it was reposed; *Tufton v. Sperni* [1952] 2 TLR 516 followed.

In the same breath the learned judge was quick to place the caveat as follows:

> Our courts, when faced with a case of undue influence in the sphere of the law of contract, must ultimately have regard to the words of our own statute, although decisions of courts of those jurisdictions where the law is akin to our own may be referred.

(e) Learned counsel for the plaintiff vehemently argues that pursuant to s. 16 of CA 1950 undue influence must be between the contracting parties, and does not include undue influence asserted by any third parties. And relies on the case of *Pan Malaysia Equities Sdn Bhd v. Loh Peay Ling* in Kuala Lumpur High Court Suit No: D2-22-3337-1999 where the court stated:

> In reading section 16(1) of the Contracts Act 1950, it appears to me that the undue influence must be between the contracting parties. So in this case, it would have to be between the P and the D however, the D is contending that Alice exercised undue influence over her and led her to execute the contract between her and the P.

[12] I must say here the court is right in saying so in respect of s. 16(1) but third parties may be liable if proper nexus can be shown to attract other sub-sections. However, I accept the plaintiff's submission that it was never pleaded nor proved by the defendant that it was the plaintiff who had influenced the defendant to open the account.

[13] This is not a case where I will say there was an unconscionable bargain to provide any form of relief to the defendant in law. In our present case, at the time of opening the account and the transactions, like any other share trading account, the defendant stands to benefit from the account and was in position to make profit from the share transactions. All the shares bought were in the defendant's name. Applying the tests propounded in the above authorities, the opening of the account and the transactions therein: (a) could not be said to be unreasonable; and (b) could not be regarded as "no sane man, not under a delusion, would make and no honest man would take advantage of" or no "right-minded person would have executed a document of that type" as have been advocated by case laws.

[14] I also do not find any merit in respect of the breach of T + 5 KLSE rules as the contract between the plaintiff and defendant does not permit the defendant to question the delay. In addition the Federal Court in the case of *Theresa Chong v. Kin Khoon & Co.* [1976] 1 LNS 165 had made the following observations:

> The rules and bye-laws of the Stock Exchange were binding on the members of the Stock Exchange. A member of the Stock Exchange who contravened the rules or bye-laws would be liable to penalties provided in the rules or bye-laws, but the rules and bye-laws did not have the force of law to render illegal or void a contract between a member and a remisier or between a remisier and buyers of shares, for failure to comply with the rules or bye-laws.

This area of jurisprudence has been well documented in the case of *Khairuddin Abd Rahman v. Capital Corp Securities Sdn Bhd* [2001] 1 LNS 148.

[15] For reasons stated above the plaintiff's claim with interest is allowed with costs and the defendant's counterclaim is dismissed with costs. The defendant, to pay costs in the sum of RM50,000 to the plaintiff.

I hereby order so.